UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KELSEY CASCADE ROSE JULIANA; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; et al.,

Defendants.

6:15-cv-1517-TC

FINDINGS & RECOMMENDATION

COFFIN, Magistrate Judge:

On April 18, 2016, this court issued a Findings and Recommendation (F&R) to the District Court recommending that the defendant United states and Intervenors' motions to dismiss this lawsuit (The Juliana Complaint) be denied. On November 10, 2016, the District Court adopted the F&R in an order denying the motions to dismiss.

On December 15, 2016, Intervenor defendants filed their answer to the Juliana Complaint, and on January 13, 2017, the United States filed its answer. On March 7, 2017, the federal defendants filed a motion to stay this litigation and a motion to certify an interlocutory appeal from the November 10, 2016 Order ("Order") denying its motion to dismiss this action. These motions were joined by Intervenors on March 10, 2017.

SUMMARY OF PLEADINGS

As summarized in the Order, plaintiffs' action against the United States, the President,[1] and various executive agencies alleges that defendants have known for more than fifty years that carbon dioxide (CO_2) produced by burning fossil fuels was destabilizing the climate system in a way that would significantly endanger plaintiffs, with the damage persisting for millennia. Despite that knowledge, plaintiff's assert defendants by their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, have permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, deliberately allowing atmospheric CO_2 concentrations to reach levels unprecedented in human history.

In its answer to plaintiff's complaint, Intervenors assert that they lack sufficient information regarding plaintiff's allegations and on that basis deny them.

The federal defendants, however, in their answer admitted the accuracy of a significant number of allegations in the Juliana Complaint, including:

> [1] That for over fifty years some officials and persons employed by the federal government have been aware of a growing body of scientific research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO2—including that increased concentrations of atmospheric CO2 could cause measurable long-lasting changes to the global climate, resulting in an array of severe deleterious effects to human beings, which will worsen over time.

Answer (#98) at ¶ 1.

> [2] That global atmospheric concentrations of CO2, methane, and nitrous oxide are at unprecedentedly high levels compared to the past 800,000 years of historical data and pose risks to human health and welfare.

Id. at ¶ 5.

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[1]Barack Obama was President at the time the action was filed, and Donald Trump has been substituted in following his inauguration to that office on January 20, 2017.

> [3] That from 1850 to 2012, CO_2 emissions from sources within the United States (including from land use) comprised more than 25 percent of cumulative global CO_2 emissions.

Id. at ¶ 151.

> [4] That there is a scientific consensus that the buildup of GHGs[2] (including CO_2) due to human activities (including the combustion of fossil fuels) is changing the global climate at a pace and in a way that threatens human health and the natural environment.

Id. at ¶ 202.

> [5] That CO_2 emissions are currently altering the atmosphere's composition and will continue to alter Earth's climate for thousands of years.

Id. at ¶ 206.

> [6] That in 2013, daily average atmospheric CO_2 concentrations (measured at the Mauna Loa Observatory) exceeded 400 ppm for the first time in millions of years [and that in 2015 reached] levels unprecedented for at least 2.6 million years.

Id. at ¶¶ 208-09.

> [7] That the Earth has now warmed about 0.9°C above pre-industrial temperatures.

Id. at ¶ 210.

> [8] That climate change is damaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species.

Id. at ¶ 213.

> [9] That current and projected atmospheric concentrations of six well-mixed GHGs, including CO_2, threaten the public health and welfare of current and future generations, and this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change.

Id.

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[2] I.e., green house gases

> [10] That human activity (in particular, elevated concentrations of GHGs) is likely to have been the dominant cause of observed warming since the mid-1900s. Plaintiffs' characterize the 1965 White House Report, which speaks for itself and is the best evidence of its contents. With respect to the third and fifth sentences, Federal Defendants admit that global surface temperatures on earth in 2014 were warmer than all the preceding years and 2015 was warmer still, with global surface temperatures having exceeded temperatures of the mid-to-late 19th century by more than 1°C.

Id. at ¶ 217.

> [11] That climate change is likely to be associated with an increase in allergies, asthma, cancer, cardiovascular disease, stroke, heat-related morbidity and mortality, food-borne diseases, injuries, toxic exposures, mental health and stress disorders, and neurological diseases and disorders.

Id. at ¶ 237.

> [12] That global temperatures are projected to increase by 2.5 to more than 11° Fahrenheit by 2100, depending on future emissions and the responsiveness of the climate system.

Id. at ¶ 245.

The above is a non-exclusive sampling of admissions made by the federal defendants in their answer to the plaintiff's complaint.[3]

STANDARD

Pursuant to 28 U.S.C. § 1292(b), an otherwise non-final order may be subject to interlocutory appeal only if the district court certifies, in writing: (1) the order involves a "controlling issue of law"; (2) the controlling issue of law is one to which there is a "substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

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[3]None of these admissions would exist in the record had the motions to dismiss (filed pre-answer) been granted.

The party seeking the interlocutory appeal bears the burden of establishing that "all three § 1292(b) requirements are met." Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). Satisfaction of all three requirements is a "minimum" for certification, Nat'l Asbestos Workers Med. Fund. v. Phillip Morris, Inc., 71 F.Supp.2d 139, 162 (E.D.N.Y. 1999) (cited in Teem v. Doubravsky, No. 3:15-cv-00210-ST, 2016 U.S. Dist. LEXIS 13452, 3 (D. Or. Jan. 7 2016)). "[E]ven when all three statutory criteria are satisfied, district court judges have unfettered discretion to deny certification." Mowat Const. Co. v. Dorena Hydro, LLC, No. 6:14-CV-00094-AA, 2015 WL 5665302, at * 5 (D. Or. September 23, 2015) (Aiken, C.J.) (quotations and citation omitted); see also Exec. Software N. Am., Inc. v. United States Dist. Ct. for the Cent. Dist. Of Cal., 24 F.3d 1545, 1550 (9th Cir. 1994) (a district court's certification decision is "unreviewable"), overruled on other grounds by Cal. Dep't of Water Resources v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008).

These requirements are jurisdictional. Couch, 611 F.3d at 633. Even if the district court grants certification, the appellate court still has the "independent duty to confirm," Kuehner v. Dickinson & Co., 84 F.3d 316, 318-19 (9th Cir. 1996), whether the appellant met its burden establishing that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). Appellate courts may deny certification for any reason, including docket congestion. Id. at 475.

Seeking to prevent "the debilitating effect on judicial administration caused by piecemeal appeal" of cases, Congress "carefully confined the availability" of review under Section 1292(b) to exceedingly rare circumstances. Id. at 471; U.S. v. Woodbury, 263 F.2d 784, 799 n. 11 (9th Cir. 1929) (Section 1292(b) to be applied "only in exceptional circumstances"); U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966) (Section 1292(b) "not merely intended to provide review of difficult rulings in hard cases"); see also Camacho v. P.R. Ports Auth., 369 F.3d 570, 573 (1st Cir. 2004) ("Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare"); see also Lawson v. FMR LLC, 724 F.Supp.2d 167 (D. Mass. 2010) ("after twenty-four years as a District Judge within this Circuit, I cannot recall an occasion in which I have been willing to make a § 1292(b) certification").

DISCUSSION

A. INTERVENORS' MOTION FOR CERTIFICATION OF POLITICAL QUESTION DOCTRINE ISSUE FOR INTERLOCUTORY APPEAL

The Order thoroughly discusses the political question doctrine and the analytical factors set forth in Baker v. Carr, 369 U.S. 186 (1962). Accordingly, it is unnecessary to re-address the merits of the political question doctrine herein. However, the following observations seem pertinent in exercising the court's discretion on the certification motion.

Rights secured by the United States Constitution invariably are committed to the Congress and Executive branches of government for implementation and enforcement. But such concomitant jurisdiction does not render issues pertaining to such rights "non-justiciable" or solely "political." This nation's history is replete with instances wherein political questions involving marital relations, reproductive rights, gender equality, racial equality, school segregation, religious practices, etc. have been the subject of Congressional legislation, Executive regulations and agency action, and Judicial review. Although intervenors argue that the claims in this case "(I) are 'textually . . . commit[ted]' to another branch by the Constitution; (ii) are not subject to 'judicially discoverable and manageable standards'; or (iii) could not be resolved without 'expressing lack of the respect due coordinate branches of government,'[4] their contentions are overstated. Nowhere in the Constitution is there a textual commitment of climate change related issues to a specific branch of government.[5] Compare, e.g., U.S. Const. art I, § 3, cl. 6 granting the Senate "the sole power to try all impeachments") and Art I, § 6, cl. 1 (Senators and Representatives "shall not be questioned in any other place" for speech or debate in either House). Further, as the court noted in its Order, the court has broad discretion in fashioning equitable relief (if appropriate) in this lawsuit that are manageable and within the judicial role envisioned by Article III of the Constitution. Among the remedies requested of the court by plaintiffs in this action are:

> Declare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of CO_2 in the atmosphere, and that, in so doing, Defendants dangerously interfere with a stable climate system required by our nation and Plaintiffs alike;
>
> Enjoin Defendants from further violations of the Constitution underlying each claim for relief;
>
> Declare Defendants' public trust violations and enjoin Defendants from violating the public trust doctrine underlying each claim for relief;
>
> Order Defendants to prepare a consumption-based inventory of U.S. CO_2 emissions;
>
> Order Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend ...

First Amended Complaint (#7) at 94.

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[4]INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL (#122-1) at p. 5

[5]The phenomenon of human-induced climate change was of course not a subject of study at the time the founders drafted the Constitution,

Thus, the court, in fashioning equitable relief in this action should the plaintiffs prevail, need not micro manage federal agencies or make policy judgments that the Constitution leaves to the other branches. The court may make findings that define the contours of plaintiffs' constitutional rights to life and a habitable atmosphere and climate, declare the levels of atmospheric CO_2s which will violate their rights, determine whether certain government actions in the past and now have and are contributing to or causing the constitutional harm to plaintiffs, and direct the federal defendants to prepare and implement a national plan which would stabilize the climate system and remedy the violation of plaintiffs rights. See Brown v. Plata, 363 U.S. 493, 526 (2011) (federal courts retain broad authority "to fashion practical remedies when confronted with complex and intractable constitutional violations."); see also Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 495-96, and note 13 (because of the great variety of local conditions, the formulation of remedies in these cases presents problems of considerable complexity likely requiring effective gradual adjustment through detailed decrees to rectify constitutional violations).

Finally, as the court noted in its Order, Intervenors' argument that a ruling in plaintiffs' favor would be disrespectful to the steps taken by the Executive and Legislative branches to address climate change is an unprecedented effort to extend the political question doctrine to prevent a court from determining whether the federal government has violated a plaintiffs constitutional rights so long as the government has taken some steps to address the damage.

To the extent Intervenors are suggesting that the topic of "climate change" is formed and determined by political values and is thus a non-justiciable political question, such an argument must be emphatically rejected. Whether or not climate change is occurring, whether or not it is human-induced, and the degree of its severity and impact on the global climate, natural environment, and human health is quintessentially a subject of scientific study and methodology, not solely political debate.[6] The judicial forum is particularly well-suited for the resolution of factual and expert scientific disputes, providing an opportunity for all parties to present evidence under oath and subject to cross-examination in a process that is public, open, and on the record. To the extent that Intervenors or the federal defendants have scientific or other evidence that may contradict any evidence presented by plaintiffs at trial on the issues presented in this lawsuit, they will have a full opportunity to do so.

Furthermore, any appellate review of the Order of the District Court allowing plaintiffs to proceed on their public trust and due process constitutional claims will only be aided by a full development of the record regarding the contours of those asserted rights and the extent of any harm being posed by the defendants' actions/inactions regarding human-induced global warming. This case, the issues therein, and the fundamental constitutional rights presented are not well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings. Thus, Intervenors seek certification "... due to the breadth of the claims involved and the vast scope of the relief sought, which would involve the commandeering of federal agencies who share regulatory and enforcement responsibilities over millions of enterprises across every sector economy." Intervenor-Defendants' Memorandum (#122-1) at pp. 7-8. But this is purely hypothetical and ignores the trial court's ability to fashion reasonable remedies based on the evidence and findings after trial.

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[6]Science and ideology have provided notable historical clashes in a trial forum previously, including Galileo's defense of the heliocentric theorem of the universe before an Inquisition court in 1633 against charges of heresy based on religious doctrine of a geocentric universe and the 1925 Scopes trial in a Tennessee State court pitting the Darwinian evolutionary theory against legislation prohibiting the teaching of evolution in any State funded schools.

B. FEDERAL DEFENDANTS' MOTION FOR CERTIFICATION OF STANDING, DUE PROCESS, AND PUBLIC TRUST CLAIMS FOR INTERLOCUTORY APPEAL

As with the political question doctrine, the Order thoroughly analyzes the standing, due process, and public trust claims and accordingly I will not revisit the merits of those issues in detail, but will address some factors that appear germane to the standards and discretionary nature applicable to the motion for certification of an interlocutory appeal.

If anything, the plaintiffs' due process claim has been enhanced since the complaint was filed given the significant admissions made by the federal defendants after the Order denying the motions to dismiss. In summary, the Government has admitted that human-induced climate change threatens the public health and welfare of current and future generations and increases the risks of loss of life. As the Order notes, the right to a climate system capable of sustaining human life is fundamental to free and ordered society and a necessary condition to exercising the rights to life, liberty, and property. Among other assertions, plaintiffs contend that federal defendants policies of promoting production of fossil fuels knowing that the increasing build up of CO_2 in the atmosphere will deprive them of a habitable climate system is action that "places [them] in peril in deliberate indifference to their safety." Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997). The plaintiffs contend that the federal defendants are denying their basic right to a habitable climate system so that the current generation can reap the economic benefits from energy production levels which exacerbate global warming while transferring the most harmful consequences of these actions to their generation and future generations. The fossil fuel production regulatory practices of federal defendants both historically and going forward will provide an evidentiary framework for their claims that a hollow hypothetical question to the appellate court would lack. In particular, given the admissions of the federal defendants in their answer, evidence of policies promoting increased production of fossil fuels and reduction of existing regulatory efforts will be relevant to the "danger creation" and "deliberate indifference" standards pertinent to plaintiffs' substantive due process claim. While the absence of a factual record developed at a trial would allow the federal defendants and Intervenors to avoid a process that would result in the trial court making findings that would significantly aid appellate review of this case.[7] As the Order explains, defendants and Intervenors mischaracterize the right plaintiffs assert and underestimate the nature of the danger allegedly created by their actions. The taking of evidence will flesh out those critical issues. The current posture of the case is such that any appeal would be premature. The plaintiffs' substantive due process claim presents a mixed question of law and fact that mandates an opportunity to develop the record.

Turning next to the government's request to certify the public trust doctrine for interlocutory appeal, such relies mainly on an expansive reading of PPL Montana LLC v. Montana, 565 U.S. 576 (2012) on an issue that has no relevance to the issue presented in this action. To reiterate from this court's F&R of April 8, 2016:

> ... the cases cited by defendants are distinguishable. In PPL Montana, LLC, the Supreme Court essentially held that the State of Montana did not hold title to riverbeds under segments of river that were non-navigable at the time of statehood. Under the equal footing doctrine, which is embedded in the Constitution, a State takes title to all riverbeds of navigable rivers upon statehood. In response to the State of Montana's argument that "denying the State title to the riverbeds here in dispute will undermine the public trust doctrine," the Court observed:
>
> > While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, see Shively, 152 U.S., at 49, 15–17, 24, 46, 14 S.Ct. 548, the contours of that public trust

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[7]See, e.g., Bennett v. City of Philadelphia, 2004 WL 187408, at *2 (E.D.Penn January 26, 2004) (factual record insufficiently developed regarding Deshaney question such that certification pursuant to 28 U.S.C. § 1292(b) would not materially advance the ultimate termination of the litigation).

> do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.
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> PPL Montana, LLC, 132 S.Ct. at 1235.

F&R (#68) at p. 18.

Translated, the Supreme Court was explaining that, under the equal footing doctrine, the state takes title to all navigable waters and their beds in trust for the public, and the contours of that public trust are thereafter determined by state law, not the Constitution. This is not a holding, as the Government would have it, that there is not a federal public trust obligation in water and seabeds (or atmosphere)[8] retained by the federal sovereignty (e.g., our nation's territorial waters).

As noted by two early Supreme Court cases - Martin v. Waddell's Lessee, 41 U.S. 367 (1842), and Pollard v. Hagan, 44 U.S. 212 (1845) - the "absolute right" to navigable waters, and the soils under them, passed to the States upon admission to the Union, for the "common use" of the "people."

In other words, this public trust over the navigable waters and riverbeds passed to the States to hold as the new sovereigns from the previous sovereign, the United States. The United States could not pass what it did not have. The public trust doctrine is rooted in our common law heritage and can be traced back millennia to ancient Roman times. And while it is true that the public trust obligations over the land and navigable streams have been transferred to the 50 States upon their admission to the Union, that does not mean that the federal public trust over United States territories (including Puerto Rico, Guam, Northern Mariana Islands, Virgin Islands, American Samoa) and its territorial seas has been abdicated or dissolved. The implications of this forsaking of a federal public trust doctrine by the Government are staggering. At oral argument on the motions to dismiss before this court, the federal defendants and Intervenors, in response to a questions from the court, responded that based on PPL Montana, Congress could lawfully alienate the nation's territorial seas to private enterprise (e.g., corporate oil interests). But, as the Court clearly articulated in the seminal case of Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (1892), a sovereignty fails to fulfill its public trust obligations if it uses or disposes of trust land in a manner that results in substantial impairment of the interest to the public. See Charles Wilkinson, The Headwaters of the Public Trust: Some of the Traditional Doctrine, 19 Envtl. L. 425, 453-54 (commenting that Illinois Central made it clear that the trust derives from federal law); See also United States Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Solicitor Department of the Interior, *Administration of Coral Reef Resources in the Northwest Hawaiian Islands,* 2000 WL 34475732 at *7 (September 15, 2000) (noting that public trust doctrine grants the government power to exercise dominion over the territorial sea to protect it and its resources for public enjoyment and noted the government's role as public trustee).

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[8]The territorial seas are clearly within the umbrella of the federal trust obligations and while its application to the atmosphere may present a novel question, plaintiffs' claim includes alleged injury from the government's actions violating its public trust obligations regarding territorial seas as well as the atmosphere.

The federal public trust doctrine may have been relatively dormant in federal courts since the 19th Century,[9] but it has hardly been extinguished. If the doctrine were to be extinguished, it assuredly

[9]But see, United States v. 32.42 Acres of Land, Case No. 05-cv-1137-DMS, (S.D.Cal. April 28, 2006) (finding that a portion of the land acquired by the United States within the tidelands (4.88 acres) was acquired subject to its federal trust); City of Alameda v. Todd Shipyards Corp., 635 F.Supp. 1447 (N.D.Cal. 1986) (holding that the United States may not abdicate the role of trustee for the public when it acquires land by condemnation); United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk County, Com. of Mass., 523 F.Supp. 120, 124-25 (D.Mass. 1981) (the federal government may take property below the low watermark in "full fee simple" but is restricted by its trust responsibilities in its ability to abdicate to private individuals its sovereign jus publicum in the land).

would not be in the form of tangential dicta in the context of a Supreme Court ruling on a matter that did not even involve the question of whether the federal government has public trust obligations over its sovereign seas and territories.

Regarding Article III standing questions, the standards enunciated in Lujan v. Defenders of Wildlife, 504 U.S. 555, (1992), have been met as a threshold matter in this case: i.e., a litigant must show 1) that she has suffered a concrete, particularized, actual or imminent invasion of a legally-protected interest; 2) the injury is caused by the conduct of the defendant; and 3) it is likely that the injury will be redressed by a favorable decision.

Plaintiffs have alleged, and federal defendants have since admitted, that human induced climate change is harming the environment to the point where it will relatively soon become increasingly less habitable causing an array of severe deleterious effects to them which includes an increase in allergies, asthma, cancer, cardiovascular disease, stroke, heat related morbidity and mortality, food-borne disease, injuries, toxic exposures, mental health and stress disorders, and neurological diseases and disorders. These are concrete, particularized, actual or imminent injuries to the plaintiffs that are not minimalized by the fact that vast numbers of the populace are exposed to the same injuries. It would surely be an irrational limitation on standing which allowed isolated incidents of deprivation of constitutional rights to be actionable, but not those reaching pandemic proportions.

Finally, the "controlling question of law" factor is met only when the issues involve a purely legal question and not a question of fact or mixed law and fact "for which additional factual development is necessary prior to ultimate disposition of an issue." Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc., 201 WL 952273 at *3 (D.Or. March 10, 2010)) (citing Ahrenholz v. Board of Trustees of the University of Illinois, 219 F.3d 674, 657-77 (7th Cir. 2000) ("We think

[Congress] used 'question of law' in much the same way a lay person might, as referring to a 'pure' question of law rather than merely an issue that might be free from factual contest. The idea was that if a case turned on a pure question of law [it would be] something the court of appeal could decide quickly and cleanly without having to study the record . . . .")). See also Century Pacific, Inc. v. Hilton Hotels Corp., 574 F.Supp.2d 369 (S.D.N.Y. 2008) (holding that in order to certify a controlling question of law the appeal "must refer to a "pure" question of law that the reviewing court could decide quickly and cleanly without having to study the record"); Keystone Tobacco Co. v. U.S. Tobacco Co., 217 F.R.D. 235, 239 (D.D.C. 2003).

As set forth above, that factor is not present herein. Among the numerous factual questions that would be addressed at trial are:

Is climate change occurring?

If so, to what extent is it being caused by fossil fuel production?

What are the projected effects of elevated CO_2 emissions on the climate, atmosphere, seas, and habitat?

What are the projected health and morbidity risks from the continued build-up of GHGs in the atmosphere?

Have the federal defendants deliberately chosen to encourage and promote fossil fuel production with knowledge of the dangers created by those policies?

Are the federal defendants' actions a substantial cause of the alleged injuries to plaintiffs?

None of these, or other relevant factual issues, are incorporated within the hypothetical questions Intervenors and federal defendants wish to present to the appellate court. They would put the cart before the horse, and thus fail to satisfy the standards for interlocutory appeal.

CONCLUSION

For the reasons stated above, federal defendants' motion for leave to appeal (#120) and Intervenors' motion for leave to appeal (#122) should be denied. The federal defendants' motion for a stay (#121) pending consideration of the motion for leave to appeal is denied.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 1 day of May 2017.

THOMAS M. COFFIN
United States Magistrate Judge